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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 775

CALIFORNIA LUMBERMEN'S COUNCIL, COAST COUNTIES LUMBERMEN'S CLUB, CENTRAL VALLEY LUMBERMEN'S CLUB, NORTHERN COUNTIES LUMBERMEN'S CLUB, PENINSULA LUMBERMEN'S CLUB, SAN JOAQUIN LUMBERMEN'S CLUB, and the officers, councilmen, and members of said organizations, and associations,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petitioners above named respectfully present to this Honorable Court, their petition for writ of certiorari to the Honorable Circuit Court of Appeals, for the Ninth Circuit, to review a decision made and entered by that Court on October 1, 1940 (R. 184) (115 F. (2d) 178), sustaining and affirming an order of the Federal Trade Commission in which petitioners were and are ordered to cease and desist from the doing of certain acts. Petition for rehearing, filed in the said Circuit Court of Appeals, was denied on the 19th day of November, 1940. (R. 189.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners consist of various retail lumber dealers and retail lumber trade associations in northern California.

On August 14, 1936, the Federal Trade Commission (herein sometimes referred to as "Commission") issued its complaint against these petitioners (R. 2), charging them with various alleged unfair methods of competition, allegedly in violation of Section 5 of the Federal Trade Commission Act. (38 Stats. 719; 15 U. S. C. A., Sec. 45.)

Thereafter, answer having been filed (R. 22) denying the charging allegations of the complaint, extended hearings were held in California over the period of

May 4, 1937 to August 30, 1937, before Mr. Charles Diggs, an examiner of the Commission who was assigned to the hearings. With the exception of two days hearings at Sacramento, and one day at Watsonville, all the hearings were held at San Francisco.

An official shorthand reporter, employed by the Commission, was present at each hearing, to record the evidence and proceedings, and transcribe the same into a "record" to be filed with the Commission in pursuance of the requirements of Section 5 of the Federal Trade Commission Act. Mrs. Anita Smith (who will be hereafter again referred to, as a witness) was the court reporter at all the hearings at San Francisco.

Throughout the entire hearings, the trial examiner followed the practice of prohibiting and preventing the reporter from taking notes of such testimony, evidence, motions, offers of proof and other matters as he did not choose to have in the "record". There are more than 600 such instances affirmatively disclosed on the face of the "record" itself (R. 92); petitioners have no means or method of determining or showing to this Honorable Court how many more such instances occurred and which were not disclosed upon the face of the so-called "record".

A few of the many "off the record" instances affirmatively appearing upon the face of the record are:

(R. 56):

"Mr. Doyle. I offer to prove * * *

Trial Examiner Diggs. I won't accept your offer, * * * off the record."

(R. 57):

"(There was testimony and discussion on the record which was ordered physically striken by the Trial Eraminer.)

Trial Examiner Diggs. Strike it physically."

(R. 57):

"(There was testimony and discussion on the record which was ordered striken physically by the Trial Examiner.)

Trial Examiner Diggs. Strike it physically."

(R. 61):

"(There followed testimony on the record which was ordered stricken by the Trial Examiner.)"

(R. 63):

"(There was testimony and discussion on the record which was ordered stricken by the Trial Examiner.)

Trial Examiner Diggs. Strike the whole thing physically. Off the record."

(R. 93):

"Mr. Doyle. I now desire to make an offer of proof as follows: * * *

Trial Examiner Diggs. I am going to deny that offer of proof. Don't take this. Off the record. I now instruct the official reporter not to take the offer of proof on the lines indicated by counsel for the reasons I have heretofore indicated. Off the record."

(R. 95):

"Mr. Doyle. I now object and protest, object to the ruling of the Examiner made at the close of the hearing in Watsonville on June 3, 1937, compelling Respondents to proceed with the presentation of their testimony in this matter, * * *

Trial Examiner Diggs. Off the record."

(R. 95):

"Mr. Doyle. I will offer to prove by this witness * * *

Trial Examiner Diggs. Strike out the offer of proof. I deny counsel to make this proffer of proof, for the reason stated with respect to the previous witness, Mrs. Anita Smith. It is not necessary that I should repeat it.

Mr. Doyle. I offer to prove * * *

Trial Examiner Diggs. Off the record."

(R. 96):

"Mr. Doyle. I object and protest at this time, Mr. Examiner * * *

Trial Examiner Diggs. Off the record."

We also respectfully show that although documents marked "Respondents' Exhibits for Identification" numbers 1, 2, 3, 4, 5, 6 and 7 (R. 66-67) were each and all offered in evidence at the hearings before the examiner (R. 69, 71, 73, 88) by respondents (petitioners here), yet not one of those documents was included by the trial examiner in the so-called "record" which was filed with the Commission, and upon the basis of which the Commission came to its determination as to the guilt of these petitioners.

Counsel for respondents below (petitioners here), finding it impossible to obtain a fair or full record in the hearings before the trial examiner, due to the "off the record" instructions from the examiner to the official reporter, were confronted with the necessity of showing affirmatively in the record, the unfair and incomplete condition of that very record. Accordingly witness Anita Smith, the official reporter, was subpoenaed by the defense, was called to the stand and sworn as a witness for respondents; questions were propounded to her by respondents' counsel as to the irregularities in the so-called "record", and counsel was prepared to, and endeavored to, prove by her the incomplete and unfair condition of that "record" and the cause and reasons therefor. (R. 91.) The trial examiner refused to permit any examination of the witness on the subject, whereupon counsel, in pursuance of his right and duty in the matter, made an offer of proof as to the facts he proposed to prove and establish by the witness. The examiner prohibited and prevented the reporter from taking the offer of proof into the reporter's notes.

(R. 93):

> "I desire now to make an offer of proof as follows: * * *
>
> Trial Examiner Diggs. I am going to deny that offer of proof. Don't take this. Off the record. I now instruct the official reporter not to take the offer of proof on the lines indicated by counsel, for the reasons I have heretofore indicated. Off the record.

(There was a discussion off the record.)
Trial Examiner Diggs. That is all.
(Witness excused.)"

Following the unsuccessful attempt to examine witness Anita Smith, as to the condition of the record, the defense called Roscoe D. Jones, Esq., an attorney of some 30 years practice. (R. 93.) Mr. Jones had been present at the hearings held at Sacramento, and had personal knowledge of the fact that the examiner, during those hearings, frequently instructed the official reporter to refrain from taking the entire proceedings into her notes; and he observed, visually, that that reporter (who was operating a stenotype machine) obeyed the instructions of the trial examiner, and ceased operation of the machine when so ordered and commanded by the examiner. The trial examiner refused to permit the examination of witness Jones (R. 94, 95), whereupon counsel for the defense made an offer of proof. On the instruction and direction of the trial examiner, the offer of proof was excluded from the notes of the reporter, and from the record.

(R. 95):

"Mr. Doyle. I will offer to prove by the witness * * *

Trial Examiner Diggs. Strike out the offer of proof. I deny counsel to make this proffer of proof, for the reason stated with respect to the previous witness, Mrs. Anita Smith. It is not necessary that I should repeat it.

Mr. Doyle. I offer to prove * * *

Trial Examiner Diggs. Off the record."

Subsequently, and after the hearings were closed, respondents, for the purpose of bringing the situation to the direct attention of the members of the Commission, filed a motion with the Federal Trade Commission at Washington "For an Order Requiring the Official Reporter to Prepare and File with the Commission a True, Full and Correct Transcript of the Entire Record", etc. (R. 32-39.) This motion was supported by an affidavit (R. 40-46) showing the manner in which the Examiner caused the record to be untruthful and incomplete, and containing, as affirmative evidence of the seriousness of the situation, the exact offer of proof which had been made in connection with the witness, Anita Smith—no part of which offer of proof was or is contained in the so-called "Official Record". Said affidavit is set forth at pages 40-46 of the printed record herein.

Notwithstanding the fact that the motion and affidavit showed the record, as prepared by the reporter, to be incomplete, and notwithstanding the fact that the so-called official record then before the Commission showed affirmatively on its face that it was incomplete in almost numberless instances, and notwithstanding the fact that it showed affirmatively on its face that testimony and evidence had been "physically stricken", and offers of proof had been made which were not included therein, the Commission itself, with the same indifference as to the facts and the rights of respondents as had been continuously displaced by the trial examiner, made its order on November 24, 1937, denying the motion, upon the ground:

"That there is already on file, a true, full and correct transcript of the record." (R. 47.)

Thereafter and on July 23, 1938, the Commission issued its cease and desist order against petitioners. (R. 48.)

On September 22, 1938, petitioners filed their petition for review in the Ninth Circuit Court of Appeals. (R. 139-151.)

On January 21, 1939, the Commission filed in the Ninth Circuit Court of Appeals, a "transcript of record" which showed on its face that it was but a partial and incomplete record.

On January 30, 1939, petitioners filed two motions in the Circuit Court of Appeals, as follows:

1. To strike the transcript from the files. This motion being upon the ground and theory that the transcript as filed being incomplete it was not in conformity with the requirement of the statute; and that a transcript of record not in conformity with the statutory requirement was "no record at all", and

2. (Premised upon the granting of the first motion.) For an order requiring the Commission to prepare and file a proper and complete transcript of the record.

On April 12, 1939, the Ninth Circuit Court of Appeals denied both motions. In the opinion of the Court, reported at 103 F. (2d) 304, it appears that the motions were denied upon the ground and theory that

"The basis of the motion to strike is that the record as it is before us is not a true record of the

> proceedings had before the trial examiner. An examination of the petition and supporting affidavits reveals that such record is a true record of the evidence received, but that the real complaint is that the hearing was so conducted by the examiner as not to allow petitioners to make of record matters properly included in the record."

Accordingly, the Circuit Court of Appeals having recognized the incompleteness of the record as it stood, but being of the view that the record as filed, so far as it went, was merely "incomplete", as distinguished from "false", petitioners then, on April 24, 1939, filed a motion for an order requiring the Commission to file a "supplemental" transcript, thereby to complete the transcript on file.

On June 5, 1939, the Court denied said motion, upon the ground that the matters involved could be properly considered by the Court only in connection with the Court's consideration of the merits of the petition to review the order of the Commission. Honorable Francis Garrecht, Circuit Judge, filed a dissenting opinion, wherein he stated (104 F. (2d) 855):

> "Petitioners assert that the transcript heretofore filed by respondent is incomplete in this, that certain exhibits and offers of evidence were made by petitioners during the trial which were refused and rejected. Such offers and rulings respondent has refused to make a part of the record. That these assertions are true is admitted. * * *
>
> "It is further charged by petitioners and admitted by respondent that certain other evidence offered by petitioners was received, but thereafter

and before such evidence was transcribed, the examiner who conducted the hearing on behalf of respondent ordered the court reporter to delete such testimony from the record."

Petitioners having thus exhausted all means within their power to obtain a full, true and complete record, they were obliged to, and did, file their briefs; and in due time, after oral argument of the matter, the Court, on October 1, 1940, rendered its decision, sustaining the cease and desist order of the Commission. The Court's opinion is reported at 115 F. (2d) 178.

While in the hearing before the Ninth Circuit Court of Appeals numerous points were advanced and argued, the main point presented there, and the sole point which petitioners desire to present here, is that the order of the Federal Trade Commission is void, because it was issued in a proceeding, and as the result of proceedings, wherein the persons against whom the order is directed (petitioners here) were denied a fair trial and hearing by and before the Commission, and that the Honorable Ninth Circuit Court of Appeals erred in sustaining and affirming the said order of the Commission, made and issued under such circumstances.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 5 of the Federal Trade Commission Act (38 Stats. 719; 15 U. S. C. A., Sec. 45), wherein it is provided:

"The judgment and decree of the court (Circuit Court of Appeals) shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in Section 240 of the Judicial Code."

THE QUESTIONS PRESENTED.

Broadly speaking, the major, if not the sole, question presented here is whether under the facts of this case, petitioners were granted and obtained a fair trial and hearing before the Federal Trade Commission.

More specifically, the questions are:

1. Whether in a hearing before the Commission, the respondents there are entitled to a fair, full and complete record containing all the testimony, evidence, and offers of proof, etc., or whether the record, required by the statute to be made and filed with the Commission, may consist only of such portions or fragments of testimony, evidence and offers of proof as the examiner shall choose to include?

2. Whether, in a case such as this, where the examiner prevented the making of a full and fair record, and prevented the inclusion in that record of testimony and evidence which *was* adduced, *and admitted,* and of offers of proof which *were* made, and of documents which *were* offered in evidence, petitioners are relegated for their relief (if any) to the inapplicable provisions of the Act authorizing the Court to make an order for the taking of "additional evidence"; which said statutory provisions show on their face to be applicable *only* as to testimony or evidence *not offered* at the hearings?

ARGUMENT AND AUTHORITIES.

PETITIONERS' RIGHT TO A FAIR TRIAL.

It is the well settled law from the earliest times, not only in this country but in all civilized countries, that common justice requires that no man shall be condemned in either his person or his property, without a full and fair hearing and opportunity to make his defense.

Morgan v. U. S., 298 U. S. 468;
Powell v. Alabama, 287 U. S. 45, 46;
Morgan v. U. S., 304 U. S. 1.

The statement of Mr. Chief Justice Hughes, contained in the opinion in the case of *Morgan v. U. S.*, 304 U. S. 1, at page 22, is pertinent to this subject. He said:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Other cases holding that administrative agencies are obliged to grant a fair trial, are:

Chamber of Commerce v. F. T. C., 13 Fed. (2d) 673, 683, 684;

Shields v. Utah Idaho R. R. Co., 305 U. S. 177; *Ohio Bell Tel. Co. v. Commissioner*, 301 U. S. 292, 302, 304.

PETITIONERS WERE DENIED A FAIR TRIAL BEFORE THE COMMISSION.

(a) Because the statutory requirements, and guarantee, as to the making of the record, were not complied with.

The requirements that all the testimony and evidence be reduced to writing and filed with the Commission, is expressly provided in the Federal Trade Commission Act. The Act (Sec. 5; 39 Stats. 719; 15 U. S. C. A., Sec. 45) provides:

> "The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission."

That provision is of maximum importance; and strict compliance with the provision is absolutely essential to a fair trial by the accused, for the reason, among others, that the Commission (not the trial examiner) and the Commission only, is authorized or empowered by the Act to hear the case, and make the decision, the findings of fact, and the order disposing of the proceeding.

With respect to administrative bodies, it is the settled rule that the person or body designated by the statute as the trier of the facts must either hear the testimony and evidence of the witnesses, or must have all that evidence before him, or it, for weighing and consideration in arriving at his conclusions in the matter.

The most recent Supreme Court cases dealing with this subject and coming to our attention are the cases of

Morgan v. U. S., 298 U. S. 480-481-482;
Morgan v. U. S., 304 U. S. 1.

The Commission did not hear, have before it, or consider, the evidence in this case; and it could not hear or consider it, even on a record, because the examiner did not permit a full or fair record to be made.

(b) Because the examiner and the Commission, by the device of making an incomplete record, including only those matters desired by the examiner and the Commission, and excluding evidence and other matters offered by petitioners, thereby deprived petitioners of a full and fair record upon which petitioners might obtain a full and fair review in the Courts.

When, by preventing the making of a fair or full record, the examiner prevented respondents from having a fair trial and hearing before the Commission, he likewise interfered with our rights to a full and fair review in the Courts. Our rights, and our ability to obtain relief in the Courts, must necessarily rest upon the record made below; and if that record is unfairly or dishonestly made below, to our detriment, as here, we are thereby deprived of our statutory right to a fair and full review in the Courts.

And by the same token, Congress, in providing for a review by the Courts of orders of the Commission, necessarily intended that the Courts should have and exercise authority and jurisdiction to actually review such cases, not merely in theory, but also in fact.

Congress did not intend that the Courts should "rubber stamp" the orders of the Commission; nor did Congress intend that the Courts should have no right and power to review in such cases, *except* to such extent as the Commission was willing to permit. Congress intended, and the Act conclusively shows that it intended, that the Courts should have and exercise the right and power to actually and effectively review the orders and proceedings of the Commission.

The Commission, by the device of making, or sending up, an artifical, unfair, incomplete or untruthful record, can not thereby either deprive a citizen of his statutory right to a judicial review of, and relief from, such orders and proceedings; nor can the Commission by such tactics and device, be permitted to preclude the Courts from making an actual and effective review in the matter, as provided by Congress in the Act itself.

The extreme importance of a meticulous recordation by the official reporter of all the proceedings and evidence in a case is aptly stated by the Court in the recent California case of *Birkhofer v. Krum,* 23 Cal. App. (2d) 269, 72 Pac. (2d) 899. In that case the inadvertent omission from the official transcript of but two short words, viz., "an acre", changed the entire aspect and complexion of the case. The Appellate Court said:

> "One of the chief reasons for the presence of a phonographic reporter at the trial of an action is to insure a correct recordation of the testimony of the witnesses. The frailty of human

memory is so well known that one must indeed be bold to place implicit reliance upon it in opposition to the shorthand notes of a disinterested expert whose duty it is to record with meticulous correctness the oral testimony of the witnesses."

The necessity of a full, true and correct record is also declared in the cases of:

Specialty Tool Co. v. Ames, 117 Cal. App. 283, 3 Pac. (2d) 977;

Jones v. Busick, 75 Cal. App. 606, 243 Pac. 27;

In re Millsap, 75 Cal. App. 25, 241 Pac. 920;

Ward v. Waethers, 282 Pac. 147, 140 Okla. 25;

Wade v. Mitchell, 79 Pac. 95, 14 Okla. 168.

It is reversible error for the trial Court to fail to require the stenographer to take down all the proceedings.

Anoatubby v. Pennington, 148 Pac. 828 (Okla.);

Methvine v. Willmon, 166 Pac. 702 (Okla.);

Cherry v. Brown, 192 Pac. 227, 13 A. L. R. 92.

And it is reversible error for a trial Court to refuse to permit counsel to state, by way of offer of proof, what he proposes to prove by the evidence offered.

Spitzer v. Meyer, 198 Ill. App. 550;

Maxwell v. Habel, 92 Ill. App. 510;

Fidelity v. Weise, 80 Ill. App. 499;

Ehrhardt v. Stevenson, 106 S. W. 1118.

(c) Because the trial examiner, after having prevented and precluded the court reporter from making a fair, truthful and complete record, denied to petitioners the right to impeach that so-called "record" by the testimony and evidence of the very court reporter by whom that record was being made.

Heretofore at page 6, we have shown that Mrs. Anita Smith, the official reporter was called as a witness for respondents below, for the purpose of establishing the incomplete and unfair condition of the so-called record, but the trial examiner denied to petitioners the right to examine her for the purpose of impeaching the "record". Obviously no better or more competent witness existed in the world for the purpose of establishing the facts impeaching the record, because the witness was the reporter who, under the commands of the examiner, was making that record. And the other witness (Roscoe Jones), an attorney of over 30 years experience and high standing, having actually witnessed the manner of the "making of the record", was equally competent to testify.

Another instance wherein the examiner denied to petitioners the right to make an offer of proof, occurred in connection with the Commission's witness Herbert Atkinson. (R. 56.)

It will be observed that the decision of the Circuit Court of Appeals contains no discussion, or even mention, of the acts of the examiner in preventing petitioners from impeaching the so-called "record", or of his acts in preventing our offers of proof from being taken into the reporter's notes and included in the so-called "record".

It is an elementary rule, too well established to warrant extended discussion, that where in the course of a trial, objection is sustained to a question, or where the Court refuses to permit the examination of a witness along certain lines, or on a specified subject, it is not only proper, but it is essential and imperative that an offer of proof be made in the record as to what the witness would testify, or what would be proved by the witness, if allowed to testify.

Florida v. Smith, 88 U. S. 254, 261-262;
Herencia v. Guzman, 219 U. S. 44-46;
Platte v. Bosserman, 202 Fed. 692;
Gardner Co. v. Iroquois Co., 127 Fed. 648, 62 C. C. A. 374;
Ladd v. Missouri Coal Co., 66 Fed. 880, 14 C. C. A. 246;
Snowball v. Snowball, 164 Cal. 476, 129 Pac. 784;
Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733;
Risdon v. Yates, 145 Cal. 210, 78 Pac. 641;
Sonoma County v. Hall, 129 Cal. 659, 62 Pac. 213;
Hand v. Scodeletti, 128 Cal. 674, 61 Pac. 373;
Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288.

It is unquestionably the absolute and unqualified right of counsel to make an offer of proof, and to have it included and incorporated in the record; and it is reversible error for a trial Court to refuse to counsel the opportunity to make such offer of proof.

Noles v. Noles, 137 So. 19;
Spitzer v. Meyer, 198 Ill. App. 550;

Maxwell v. Habel, 92 Ill. App. 510;
Fidelity Co. v. Weise, 80 Ill. App. 499;
Ehrhardt v. Stevenson, 106 S. W. 1118.

The actions of the trial examiner in preventing the reporter from taking the offers of proof into her notes, or including them in the record, deprived respondents below of a fair trial and hearing.

THE ERRORS OF THE CIRCUIT COURT OF APPEALS.

The Honorable Ninth Circuit Court of Appeals, by its decision sustaining and affirming the order of the Commission, thereby held, in effect, that the acts and doings of the examiner and the Commission, and the making by them of an incomplete and unfair "record", and their refusal to include in the record all the testimony, offers of proof, and documentary exhibits offered by these petitioners, was not in violation of any of the rights of petitioners, and accordingly petitioners were not thereby deprived of a fair trial and hearing.

It will be observed that nowhere in the decision of the Circuit Court of Appeals has that Court even as much as recognized or mentioned, much less discussed, our complaints as to the refusal of the examiner to include our offers of proof in the "record". The Honorable Circuit Court of Appeals disposes of our contentions with regard to the unfair and incomplete condition of the record in the following language:

> "Other claimed instances of an unfair trial relate to rulings upon the admission of evidence which resulted in the rejection or the striking from the

record of evidence admitted. Petitioner claims the ruling of the Commission should be nullified because of such rulings by the Examiner. But petitioner should have applied to the Commission for leave to produce the evidence deemed to have been wrongly kept out of the record. The Statute provides:

> " 'If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the Court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such a manner and upon such terms and conditions as to the court may seem proper.' "

As to the matter of applying *to the Commission* for leave to adduce "additional evidence" under the aforesaid statute, we point out that the statute does not even authorize (much less require), any such procedure. In the first place the statute authorizes only applications to the Circuit Court of Appeals, not to the Commission. However, as indicative that we did all in our power to obtain relief from the Commission, we point out that we did seek relief from the Commission, but our prayer was denied upon the ground that there was already on file with the Commission a true, full and correct transcript, etc. We completely exhausted our remedies in so far as the Commission was concerned. And in so far as the Circuit Court of Ap-

peals is concerned, we completely exhausted our remedies before that Court by our motions filed therein.

Now, secondly, as to making any application *to the Courts,* or any Court, for "leave to adduce additional evidence" under the provision of the statute quoted above, we respectfully point out, first, that our complaint is directed not to *rulings* upon the admissibility of evidence, but rather to the action of the examiner and the Commission in:

(1) Failing and refusing to include *in the record* all the evidence that *was* admitted; (2) failing and refusing to include *in the record* offers of proof made in relation to evidence which was offered but which the examiner ruled to be inadmissible, and (3) failing to include in the record all the evidence, including documentary evidence which *was offered* and which *was admitted.*

Except as to the matter of the offers of proof, it is obvious that our complaints were and are largely with regard to evidence which *was adduced at the hearings;* and much of our complaint is with regard to testimony, evidence, etc., which was not only *adduced* below, but which was *actually admitted*—but which was not included in the record.

With respect to the said statutory remedy which the Circuit Court in its opinion has held to be available to us, we respectfully submit that the Court was in error in that regard. That statutory provision shows affirmatively upon its face that it is not available to anyone except for the purpose of obtaining permission

of Court to offer *additional evidence;* and the statute itself in the very portion quoted in the opinion very plainly shows that before any person may avail himself of that statute he must make an affirmative showing as follows: (1) That the additional evidence which he now seeks to offer (adduce) is material; (2) that that evidence was *not offered* (adduced) at the time of the hearings; (3) that there are or were reasonable reasons or grounds *why he did not offer that evidence at the time of the hearings* before the Commission, and (4) that the additional evidence which is desired to be offered is material.

It is plain from the clear language of the statute, that "additional evidence" means only evidence *not offered* in the hearings below.

Obviously, that statute was not available to us for the reason, among others, that the missing evidence as to which we complain, *was adduced* below; and it would be utterly impossible for us to make the showing required by the statute, as condition precedent, to-wit, that the evidence in question was *not* offered below; and further because that oral evidence was gone and became impossible of replacement by us, upon the dying of the echo of the spoken words of the witness. Furthermore, and upon any fair and reasonable reading and interpretation of that section, we respectfully submit that it was never even *intended* to cover a situation, such as is present here, where evidence which *was taken* is withheld from the Courts by the simple expedient of not including it in the record sent to the Court. If such a procedure is ever countenanced or

permitted, then the right to a fair trial before administrative tribunals and all rights to any actual and effective review in the Courts will thereby become a myth because of the total inability of the respondent to obtain any review in the Courts, except to the extent the administrative tribunal is willing to permit.

And as to our offers of proof, we submit that where in any proceeding, objection is sustained to evidence offered, it is the elementary, fundamental, absolute and unqualified right of the offering party to make his offer of proof; and where that right exists, there must necessarily exist, and there does exist on the part of the presiding tribunal or officer, a corresponding absolute duty to permit that offer of proof to be made and taken into the record. As to this point, we find no discussion or consideration in the opinion of the Honorable Circuit Court of Appeals.

We respectfully submit that the action of the examiner and of the Commission, in refusing to include in the record, our offers of proof, is sufficient in and of itself, and without regard to any other factor or point, to establish conclusively, a denial of a fair trial and hearing below.

Before the Honorable Circuit Court of Appeals, we also urged that the cease and desist order was void because the Commission, in arriving at its determination and conclusion as to the guilt of the petitioners, did not have before it, or available to it, a record or transcript containing all the testimony and evidence given and adduced in the hearings.

Under the Federal Trade Commission Act (15 U. S. C. A., Sec. 45) the power and jurisdiction to hear and determine cases is vested solely in the Commissioners of the Federal Trade Commission; no such power is vested is an examiner. Nor is there any provision in the Act which, even inferentially, authorizes or permits the Commission to delegate any of its quasi-judicial powers to any of its servants or employees. The Act expressly requires that *the hearing shall be before "the Commission";* and the findings must be made by "the Commission"; likewise the order.

As has been shown, the "record" made in the hearings before the trial examiner was not true, full or complete. It did not contain all the testimony, evidence, objections, rulings, documents offered, offers of proof and other proceedings had.

As shown hereinbefore, the Commission is the trier of the facts, and the hearing of the case must be before the Commission. No witnesses having been examined before the Commission in this case, the Commission, in its consideration, if any, of this case, was necessarily confined to an inspection of the incomplete and scanty "record" made by the trial examiner. Consequently, the Commission made its cease and desist order against petitioners herein, without having before it, or even available to it, and without considering, all the testimony and evidence given in the proceedings.

With respect to administrative bodies, it is the settled rule that the person or body designated by the statute as the trier of the facts must either hear the testimony and evidence of the witnesses, or must have

all that evidence before him, or it, for weighing and consideration in arriving at his conclusions in the matter.

The most recent Supreme Court cases dealing with this subject and coming to our attention are the cases of

Morgan v. U. S., 298 U. S. 480-481-482;
Morgan v. U. S., 304 U. S. 1.

In passing upon this point, the Honorable Circuit Court of Appeals held, and said:

> "There is no requirement in the act that the hearing be before the entire board. The requirement is only that testimony be taken in a hearing provided for by the Board and when reduced to writing, filed in the office of the Commission. The report made by the Commission is clearly made upon the basis of the written facts as so filed, and that this is the method intended is shown by the treatment in the statute of these two subjects; i.e., first the filing of the written testimony as produced at the hearing, and then the report based upon such hearing (as shown by the filed transcript of the trial)."

In other words, the Circuit Court has held in effect that, if the Commission, in coming to its determination as to the guilt or innocence of the respondents, makes its decision upon the basis of the written facts *as so filed*, then the statute is complied with. We respectfully submit that such might not always be the case, and the rule must go further. We respectfully submit that it is the duty of the Commission under the statute to have before it, in the transcript, *all* the testimony

and evidence adduced, and *all* offers of proof which were made, and *all* documentary evidence, including that which was ruled inadmissible at the hearings; and that with *all* this record before it, the Commission must make its determination. We submit that if the "record" before the Commission does not contain or include *all* the testimony or evidence, or *all* the offers of proof, and if the respondents bring the matter to the attention of the Commission, or if as here the record shows on its face to be incomplete, and the Commission declines to rectify the matter, then its consideration of the case, upon the obviously incomplete record, is unfair and is a nullity; and its order, if against the respondents is void. We respectfully submit that the principle laid down by this Honorable Supreme Court in the cases of *Morgan v. U. S.* is decisive on the point.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

That the decision of the Circuit Court of Appeals, sustaining and affirming the order of the Commission, notwithstanding the fact that by reason of the condition of the "record" the Commission in determining the case could not have had, and did not have before it a transcript of all the testimony and evidence, is probably in conflict with the decisions of the United States Supreme Court in the cases

Morgan v. U. S., 298 U. S. 468-481;
Morgan v. U. S., 304 U. S. 1.

That decision of the Circuit Court of Appeals, sustaining and affirming the order of the Commission, notwithstanding the fact that petitioners were denied a fair trial and hearing before the Commission, is probably in conflict with each and all the following cases, to-wit:

Morgan v. U. S., 298 U. S. 468;
Morgan v. U. S., 304 U. S. 1;
Powell v. Alabama, 287 U. S. 45;
Ohio Bell Tel. Co. v. Commissioner, 301 U. S. 292;
Chamber of Commerce v. F. T. C., 13 Fed. (2d) 673.

That the decision of the Circuit Court of Appeals is erroneous in holding in effect, that where, as here, petitioners were prevented from making and obtaining a full and fair record, upon which their guilt or innocence was to be determined by the Commission, were not denied due process, and were not thereby deprived of a fair trial and hearing.

That the decision of the Circuit Court of Appeals is erroneous in holding as it does, in effect, that in a trial on a Federal Trade Commission complaint, where the hearings are conducted before an examiner of the Commission, the record to be filed with the Commission for its use in determining the guilt or innocence of the respondents, may be limited and restricted by the examiner to such portions of the testimony, evidence and proceedings as are pleasing to him and as he chooses to include therein, and that all other testimony,

evidence, exhibits, offers of proof and other proceedings had may be omitted therefrom.

That the Circuit Court of Appeals, by its decision in this case has decided a Federal question of substance, to-wit, as to the rights of respondents before the Commission, and as to the procedure required in hearings before the Commission; and in such decision has so far sanctioned a departure from the accepted and usual course of judicial proceedings, as to call for the exercise of this Honorable Court's power of supervision.

That the decision of the Circuit Court of Appeals is erroneous, in holding as it does, in effect, that where in a trial on a Federal Trade Commission complaint, a record is made by the Commission or its examiner, which fails to include testimony, evidence, motions, offers of proof and other matter, all of which was "adduced" at the hearings, and much of which was admitted at the hearings, the respondents are relegated for relief to the making of an application for "leave to adduce additional evidence" as provided in the Act. (The statutory provision in question being by its terms expressly limited to evidence which was *not offered* (adduced) at the hearings, and the statute expressly requiring, as a condition precedent to its invocation, a showing to the Court that the "additional evidence" sought to be adduced *was not offered at the hearings,* and substantial excuse for the failure to so offer it at the hearings.)

That the decision of the Circuit Court of Appeals is erroneous in that it fails to declare that the actions

of the examiner in excluding from the "record" proper offers of proof made by petitioners, was contrary to the settled fundamental law, and constituted a denial to petitioners of a fair trial and a denial of due process. And said decision is thereby probably in conflict with the decisions in the cases of:

Florida v. Smith, 88 U. S. 254, 261-262;
Herencia v. Guzman, 219 U. S. 44-46;
Platte v. Bosserman, 202 Fed. 692;
Gardner Co. v. Iroquois Co., 127 Fed. 648, 62 C. C. A. 374;
Ladd v. Missouri Coal Co., 66 Fed. 880, 14 C. C. A. 246;
Snowball v. Snowball, 164 Cal. 476, 129 Pac. 784;
Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733;
Risdon v. Yates, 145 Cal. 210, 78 Pac. 641;
Sonoma v. Hall, 129 Cal. 659, 62 Pac. 213;
Hand v. Scodeletti, 128 Cal. 674, 61 Pac. 373;
Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order (1) To clarify the law as to the rights of respondents before the Federal Trade Commission, and to define a "fair trial and hearing" in relation to hearings before the administrative tribunal, Federal Trade Commission; (2) To bring the decision in this case in conformity with

the earlier decisions of this Honorable Court, and the various Circuit Courts of Appeals as to the rights of litigants before an administrative tribunal, to a fair trial and hearing, and to a full and fair record on which their guilt or innocence may be determined, and their rights preserved, both before the Commission and the Courts; (3) To correct the judgment in this case, which, so far departs from the accepted and usual course of judicial proceedings that petitioners were denied due process of law.

Dated, San Francisco, California,
February 14, 1941.

Respectfully submitted,
MORGAN J. DOYLE,
Counsel for Petitioners.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of February, 1941.*

_____

Chief Counsel, Federal Trade Commission,

Counsel for Respondent.